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FILE COPY

No. 413

IN THE

Supreme Court of the United States

October Term, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF

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THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit in this case is reported in 113 Fed. (2d) 473 (Adv. Op.). It was handed down June 13, 1940, with rehearing denied July 31, 1940, and appears in the record herein at page 497, et seq. The May 9, 1939, "Decision, Order and Direction of Election" of the National Labor Relations Board which was the subject matter of the decision before the Circuit Court of Appeals is reported in 12 NLRB, No. 87, and appears in the record herein at page 27, et seq.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered August 19, 1940 (R. p. 538); rehearing denied July 31, 1940 (R. p. 537). The jurisdic-

tion of this Court was invoked under Section 10 (e) of the National Labor Relations Act (49 Stat. 449) and Section 240 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 347), by Petition for Writ of Certiorari filed herein on September 9, 1940. On October 28, 1940, this Court entered its Order granting said Petition for Writ of Certiorari, limited to the first and second questions presented by the Petition (R. p. 542). (85 Law Edition, Adv. Op., p. 79).

STATEMENT OF THE CASE

The judgment of the Circuit Court is for the enforcement (with exceptions not material here) of an order entered by the Respondent, National Labor Relations Board, against the Petitioner, Continental Oil Company, on May 9, 1939 (R. p. 27) in a proceeding brought under the National Labor Relations Act (49 Stat. 449).

The Petitioner was carrying on an oil-producing business in the Big Muddy Field and in the Salt Creek Field and an oil refinery business in the Town of Glenrock, all in the State of Wyoming. The proceedings involved all three of these operations. Prior to the consideration of the case by the Circuit Court Petitioner ceased operating in the Salt Creek Field and because of this the Circuit Court, by its judgment and decree, neither enforced nor set aside the Board's Order as to the Salt Creek Field (R. p. 541), thus leaving in the case before the Circuit Court only the question of the enforcement of the Board's Order as to the Big Muddy Field and the Glenrock Refinery.

The case before the Labor Board involved a consolidation of a petition for investigation and certification of representatives under Section 9 (c) of the Act as to the Salt Creek Field, with an amended complaint involving the Salt Creek Field, the Big Muddy Field, and the Glenrock Refinery, based upon charges filed by the Oil Workers International Union, and alleging unfair labor practices in violation of Section 8, subsections (1), (2), (3) and (5) of the Act. The amended complaint was filed February 25, 1938 (R. p. 83). A hearing was had before a Trial Examiner designated by the Labor Board at Casper, Wyoming, on

March 3, 1938, to March 17, 1938 (R. p. 107). On May 11, 1938, the Trial Examiner filed his Intermediate Report finding all the issues against the Petitioner (R. pp. 104 to 139).

The Board entered its "Decision, Order and Direction of Election" (hereinafter referred to as the Board's Order) on May 9, 1939.

On May 25, 1939, (R. p. 1) Petitioner filed its Petition with the United States Circuit Court of Appeals for the Tenth Circuit to review the Board's Order of May 9, 1939. On July 10, 1939, the Board filed with the Circuit Court its answer to the petition for review and its request for the enforcement of the Board's Order (R. p. 19).

Among the charges against the Petitioner contained in the complaint and amended complaint issued by the Labor Board were the following (quoting from the amended complaint, R. p. 89):

"XIX.

"The Respondent, by its officers, agents and employees, on or about April 27, 1936, while engaged as described above, did discharge Ernest Jones and D. F. Moore, employees of the Respondent, and has at all times since said date refused to reinstate said Ernest Jones and D. F. Moore.

"XX.

"The Respondent discharged and refuses to reinstate said Ernest Jones and D. F. Moore for the reason that said employees joined and assisted a labor organization known as International Oil Workers Union, and engaged in concerted activities with other employees of the Respondent for the purpose of collective bargaining and other mutual aid and protection.

"XXI.

"By its discharge of said Ernest Jones and D. F. Moore, and

its refusal to reinstate said employees, as above set forth, the Respondent did discriminate and is discriminating in regard to the hire and tenure of employment of said Ernest Jones and D. F. Moore, and did discourage and is discouraging membership in Oil Workers International Union, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, Subsection (3) of said Act."

The Labor Board, in its Order and Decision of May 9, 1939, sustained these charges (R. pp. 43 to 49) upon what the Board concluded to be conflicting evidence which it resolved in favor of the Board.

The judgment of the Circuit Court sustains the Board's Order as to Moore and Jones and requires the Petitioner to (quoting from the judgment of the Circuit Court, R. pp. 540 and 541):

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act;

* * * * * * * *

"(d) Offer to Ernest Jones and F. D. Moore immediate and full reinstatement to the positions formerly held by them at Big Muddy Field or positions substantially equivalent thereto at said Field, without prejudice to their seniority, insurance, or other rights and privileges;

"(e) Make whole Ernest Jones and F. D. Moore for any loss of pay or other pecuniary loss they may have suffered by reason of Continental Oil Company's acts by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from the date of the termination of his employment to the date of Continental Oil Company's offer of reinstatement, less his net earnings during that period, deducting, however, from the amount otherwise due to each employee monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work relief

projects and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects. If an accounting shall be necessary or requested by the petitioner, Continental Oil Company, or by the said Ernest Jones or F. D. Moore in order to determine the exact amount of money due said Ernest Jones and the said F. D. Moore, or either of them, such accounting shall be had under the direction of the National Labor Relations Board, and thereupon a subsequent order shall be entered by said Board awarding the precise sum, if any, due in each instance;

"(f) Procure for F. D. Moore the restoration of insurance rights, which he lost upon the termination of his employment."

The Petitioner in its Petition for Writ of Certiorari filed herein presented eight questions. The first five of these questions relate to the reinstatement and reimbursement of Moore and Jones. We quote these five questions from the Petition for Writ of Certiorari, together with the reasons relied upon for their allowance.

"Question 1

"Where an employee (Ernest Jones) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses to accept such transfer and quits his employment, does the National Labor Relations Board have the power to order such employee's reinstatement to his former position where it appears that immediately after the cessation of his employment he purchased, and at all times since has operated, a general merchandise store as proprietor thereof in addition to acting as United States Postmaster? If such power in the Board exists, is it an abuse of discretion to order such reinstatement?

"Question 2

"Where an employee (F. D. Moore) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses such transfer on account of the alleged illness of his wife, and the employer, after verifying such illness, within a day or two after the transfer order offers the employee reinstatement to his old position 'for the duration of his wife's illness,' which offer the employee refuses and thereupon quits his employment from which he was receiving a wage of $112.50 per month (without room and board) and accepts and retains employment at the Wyoming State Penitentiary at a wage of $70 per month, plus room and board, and it appears that at all times up to the hearing before the Trial Examiner of the Labor Board the wife's illness continued, does the Board have the power to order such employee's reinstatement, or, if such power exists, is it an abuse of discretion to order such reinstatement?

"Question 3

"Does the Board have the power, under the facts outlined in Question 1, to order the employer (Petitioner) to reimburse the employee (Ernest Jones) for pecuniary losses he may have sustained in the conduct of his general merchandise store, or, if such power exists, did the Board abuse its discretion in ordering such reimbursement?

"Question 4

"Does the Board have the power, under the facts outlined in Question 2, to order the employer (Petitioner) to reimburse the employee (F. D. Moore) for pecuniary losses he may have sustained between the date he quit his employment and the date of offer of reinstatement? In any event, should not the reimbursement be limited to a period terminating at the time when he was offered reinstatement 'for the duration of his wife's illness'?

"Question 5

"The Board's Order requiring reinstatement of employees Moore and Jones, with reimbursement, provides: 'deducting, however, from the amount otherwise due to each employee monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work relief projects and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects; * * *.' Even assuming the order of reinstatement and reimbursement to be proper, does the Board have the power to require the Petitioner, as employer, to comply with the above quoted portion of its reimbursement order, or, if it has such power, did it abuse its discretion in so ordering in this case?

"Reasons Relied on For the
Allowance of the Writ as to Questions
1, 2, 3, 4, and 5

"(a) The decision of the Circuit Court of Appeals in this case in ordering the reinstatement of Ernest Jones and F. D. Moore under the circumstances outlined in the above questions and in ordering reimbursement for pecuniary losses up to the time of the offer of reinstatement is in conflict with the decisions of other Circuit Courts of Appeal on the same matters, viz.; the Board has no power to order reinstatement and no power to order reimbursement unless the status of employee exists at the time of the entry of the Board's order and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment.

"(b) In ordering the reinstatement of Ernest Jones and F. D. Moore under the circumstances outlined in the above questions and in ordering reimbursement for pecuniary losses sustained prior to offer of

reinstatement, the Circuit Court has decided federal questions in a way probably in conflict with applicable decisions of this court which has held that the authority of the Board to require affirmative action is remedial and not punitive.

"(c) If it should be considered that the decisions of this court referred to in subdivision (b) supra are not controlling, then the Circuit Court in this case has decided important questions of federal law which have not been, but should be, settled by this court.

"(d) With further reference to the point raised in Question 5, conflicting decisions have been rendered by the various Circuit Courts and this question is now pending before this court in the case of *Republic Steel Corp. v. NLRB*, 107 Fed. (2d) 472 (3); certiorari granted 60 S. Ct. 1072."

This Court granted the Writ of Certiorari limited to Questions 1 and 2. While the writ has been limited to Questions 1 and 2, we have also quoted Questions 3, 4 and 5 presented in the Petition for the Writ as we deem the points raised in these questions, together with the facts upon which they are based, to be pertinent and necessary to a full and proper consideration of the points raised in Questions 1 and 2.

Evidence

For some considerable time before May 1, 1936, Petitioner had been engaged in centralization of powers in the Big Muddy Field. At one time each well or each few wells had its own pump to pump oil therefrom, which pump was operated by power. Gradually more wells were connected to the same power, known as central powers, and this process became known as centralization of powers. It resulted in fewer powers in the field and of course with fewer powers, fewer pumpers to operate them were required. Between the first of the year, 1936, and April, 1936, the Petitioner had increased its weekly hour schedule to 48 hours in Salt Creek Field and in the Lance Creek Field,

Wyoming. It determined to put the 48-hour schedule into effect in the Big Muddy Field on May 1, 1936. There were 26 employees (exclusive of supervisory employees) then working in the Big Muddy Field. There was only a given quantity of work to do. A smaller number of men could perform this work with a 48-hour weekly schedule than with the then existing 36-hour weekly schedule. The combination of centralization of powers and increase in weekly hour schedule made it necessary to reduce the working force in the Big Muddy Field by 4 as a business proposition. The necessity for this reduction in working force was testified to by R. S. Shannon, Superintendent of the Rocky Mountain Division of Petitioner (R. pp. 304 to 308); J. C. Thomas, Petitioner's Division Superintendent (R. p. 425); R. C. Bartels, Petitioner's Field Foreman (R. p. 365); Albert D. Shipp, Union District Representative (R. p. 177); and by Ernest Jones (R. p. 177), and F. D. Moore (R. p. 283). It was the policy of the Petitioner with reference to the change to the 48-hour weekly schedule in all its fields, including Big Muddy Field, in accomplishing the necessary reduction of forces, to avoid discharging any of the employees, if possible, and to transfer them to other fields operated by the Petitioner (R. pp. 306, 366). Transfers from one field to another were common in the oil business, including the business of the Petitioner. [Respondent's Exhibits 18 (A) and 18 (B) (R. pp. 327, 494), and Respondent's Exhibit 19 (R. pp. 327, 495).]

Jones and Moore were two of the employees of Petitioner in the Big Muddy Field. In accordance with this business necessity of reducing the working force in Big Muddy Field by 4, the supervisory officials of the Petitioner selected 4 men whose employment was to be changed from the Big Muddy Field. Two of these were changed to other fields of the Petitioner in Wyoming, and Jones and Moore were transferred to the Petitioner's field in Lea County, New Mexico, known as the Hobbs Field. Jones was given notice of his transfer on April 27, 1936, to become effective May 1, 1936 (R. p. 206). Jones refused to accept the transfer and his services were terminated on May 1, 1936, or

within a day or two thereafter (R. pp. 208 to 212, 233), although he was given a check for a week's termination pay from May 1, 1936, to May 7, 1936 (R. pp. 214, 319).

On May 15, 1936, (within two weeks after his services were so terminated) Jones purchased a general store, including a grocery and meat store, in Parkerton, Wyoming, which is a town on the edge of the Big Muddy Field, which store he has been operating ever since. In addition to that, he was appointed United States Postmaster at Parkerton, as successor to his mother. Both Jones and his wife worked continuously, or practically continuously, in the store after he purchased it, and his wife took charge of the postoffice work, although Jones himself was the postmaster. (R. pp. 195 and 237, 238.)

Jones gave some incomplete testimony as to his earnings from the operation of his store over our objection (R. pp. 300 to 303), but finally this line of testimony was dropped, with a statement by the Board's attorney Shaw as follows:

"Mr. Shaw: Mr. Examiner, the evidence shows that the earnings of the witness Jones, if any, have resulted from the operation by himself of a general store and postoffice in the town of Parkerton, Wyo.

"The witness has testified that this is his sole source of earnings. There may be the added element of cost accounting involved in trapping. At any rate, I think that this hearing is no place for us to go into involved matters connected with cost accounting, showing profits and losses in the grocery and postoffice business. The matter would be lengthy, and, I think, improper.

"I am, therefore, not at this time introducing any evidence concerning the earnings of this witness from April 27, 1936, up to the present time; and I shall ask the Board to hold such matters relating to Jones' earnings until such time as it becomes necessary to make actual restitution in the form of back wages in case the

National Labor Relations Board may enter an order reinstating this man to his former position in the respondent with back pay."

Accordingly, no further evidence as to Jones' earnings, either gross or net, subsequent to the termination of his employment with Petitioner, was introduced.

Jones, at the time of the termination of his employment, was a relief pumper for the Petitioner in the Big Muddy Field (R. p. 195). He had worked steadily, except when he was sick or injured, for the Petitioner since 1926, and had originally gone to work for the Petitioner in September, 1924 (R. p. 195). He had worked for Petitioner in the Salt Creek Field and the Big Muddy Field in Wyoming and in the Walden Field in Colorado (R. p. 196). His work varied, part of the time firing boilers or as a roughneck or helper on the drilling rig (R. pp. 196-198); building and tearing down tanks; and other jobs until 1929, when he became a well pumper, and he performed this work until 1935, when he became a relief pumper until his employment was terminated (R. p. 198).

Jones was earning $117.50 per month as a relief pumper at the time his services were terminated. Between that time and the spring of 1938 when the hearing was had before the Trial Examiner the wage for this job in the Big Muddy Field had been increased first to $130 per month, and then to $140 per month (R. p. 227). Jones' wage, if he had accepted his transfer to Hobbs, New Mexico, as a roustabout would have been $120 per month at that time (Respondent's Exhibit No. 14 (N), R. p. 482), with no evidence as to the roustabout pay in the Hobbs Field at the time of the hearing.

Moore had been employed by the Petitioner, or its predecessor, in the Big Muddy Field since 1919. He had performed a variety of jobs and had been a roustabout, a gang pusher, tool dresser, had cleaned out wells, was well-driller for a short time, was rotary drill helper, and was a roustabout in April, 1936 (R. pp. 263 to 267). He was notified by the Field Foreman of his transfer to the Hobbs,

New Mexico, Field on April 26 or 27, 1936 (R. pp. 266-271). He refused to accept the transfer upon the ground that his wife was ill and could not be moved (R. pp. 269, 276, 397, 487, 437, 491). Moore was 54 years old at that time (R. p. 272). Moore testified he was told that his job in the Hobbs Field would be as a dresser of tools (R. p. 272). The Petitioner investigated and verified Moore's claim as to his wife's illness and within seven or eight days after the original notice of transfer told Moore that he was transferred to the nearby Fort Collins, Colorado, Field instead of to Hobbs, New Mexico (R. pp. 277 and 317). Moore likewise refused the transfer to the Fort Collins Field (R. pp. 270, 277). Moore was then told that the transfers either to the Hobbs Field or the Fort Collins Field had been revoked on account of his wife's illness, and that he could go back to work in the Big Muddy Field (R. p. 278). Moore testified that the Field Foreman said he could go back to work in the Big Muddy Field "for the duration of my wife's illness." (R. p. 278) This statement was denied by the Field Foreman, but the Board resolved this conflict in favor of Moore's testimony (R. p. 45). Moore refused to return to work in the Big Muddy Field, as testified by him, for the duration of his wife's illness, and did not thereafter report for work (R. pp. 271, 285 and 293). Moore testified that his wife had never regained her health and was still ill at the time of the hearing before the Trial Examiner in the spring of 1938 (R. pp. 278, 279). Moore at that time was earning $112.50 per month as roustabout in the Big Muddy Field. He rented a house and garage for which he paid $18 per month, and then paid his other living expenses also out of his wage (R. p. 280). On the first day of June, 1936, he took a job as guard at the state penitentiary at Rawlins, Wyoming, which he still held at the time of the hearing. For this job he was being paid $70 per month, plus his room and board (R. p. 280). Moore's wage in the Hobbs, New Mexico, Field, if he had accepted the transfer, would have been $145.60 per month (R. pp. 276, 317).

After Moore terminated his employment he, like Jones, received a termination check of $25 or $26.50 (R. p. 271).

Both Moore and Jones were active members of the local union, both being members of the Workmen's Committee of that Union, and Jones being Secretary of the Union.

As above stated, among the charges against Continental Oil Company were charges that it had, for union reasons, in violation of the Act, discharged Jones and Moore and refused to reinstate them. The record contains several hundred pages of evidence relating to the issues involving these charges concerning Moore and Jones. The Board found (R. p. 49), and the Circuit Court affirmed that the Petitioner by the transfers of Moore and Jones had discriminated against them for union reasons. While still protesting that such finding was not sustained by any substantial evidence, we are limiting our references to such portions of this evidence as seem properly to have a bearing upon the specific questions over which this Court has in this case assumed jurisdiction.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The Circuit Court of Appeals erred:

1. In ordering the reinstatement of Ernest Jones.

2. In ordering the reinstatement of F. D. Moore.

3. In ordering the Petitioner to reimburse Ernest Jones for pecuniary losses he may have sustained in the conduct of his general merchandise store.

4. In ordering the Petitioner to reimburse F. D. Moore for pecuniary losses he may have sustained, and in any event not limiting such reimbursement to a period terminating at the time he was offered reinstatement "for the duration of his wife's illness."

5. In ordering the Petitioner to deduct from the reimbursement payments directed to be made to Moore and Jones moneys received by them for work performed upon federal, state, county, municipal or other work relief projects and to pay over the amounts so deducted to the appropriate fiscal agency of the federal, state, county, municipal or other gov-

ernment or governments which supplied the funds for said work relief projects.

While this Court has limited its order granting certiorari to Questions Nos. 1 and 2 contained in the Petition for Writ of Certiorari and quoted above herein (pp. 5, 6), which questions are covered by the assigned errors Nos. 1 and 2 above, it would seem that assigned errors Nos. 3, 4 and 5 above properly and necessarily have a bearing upon and are corollary to the matters to be considered in connection with the propriety of the orders requiring the reinstatement of Jones and Moore.

ARGUMENT

The Findings of the Board, Sustained by the Circuit Court, Do Not Support the Charges in the Complaint of Unlawful Discharge of Jones and Moore.

The charge against the Petitioner in Paragraph XIX of the amended complaint quoted at page 3 supra is that the Petitioner discharged Jones and Moore and refused to reinstate them in violation of the Act. The evidence fails to show any discharge but affirmatively shows there was no discharge. The Petitioner ordered Jones and Moore transferred from one field to another. These transfers Jones and Moore refused to accept and thereby terminated their employment. The Board has made no finding of any discharge, lawful or unlawful, but has found the transfers as above outlined, and that the Petitioner was guilty of discrimination, for union reasons, in ordering the transfers of these two employees (R. p. 49).

Our first contention is that there is an absolute variance between the charge in the complaint and the evidence and the findings. The findings do not support any charge in the amended complaint. This being so, then irrespective of whether or not the findings are sustained by substantial evidence, they cannot form the basis of relief. The Petitioner has been charged with one offense. It has not been found guilty of that offense, but has been found guilty of an offense of which it was not charged, and relief has been based upon that finding. We submit that to base the affirmative

relief of reinstatement upon such a finding not covered by any charge or allegation in the complaint is improper.

We will now proceed to a discussion of the separate reinstatement orders applicable to Jones and Moore, respectively. Question No. 1 presented in the Petition for Writ of Certiorari and set forth above (page 5 supra) relates to Jones and is as follows:

"Question 1

"Where an employee (Ernest Jones) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses to accept such transfer and quits his employment, does the National Labor Relations Board have the power to order such employee's reinstatement to his former position where it appears that immediately after the cessation of his employment he purchased, and at all times since has operated, a general merchandise store as proprietor thereof in addition to acting as United States postmaster? If such power in the Board exists, is it an abuse of discretion to order such reinstatement?"

The facts upon which the above question is based are disclosed by the record references hereinabove made.

Assuming that the finding that the Petitioner was guilty of discrimination in violation of the Act in the transfer of Jones and assuming, arguendo, that the charges in the complaint against the Petitioner issued by the Labor Board justified such a finding and any relief based thereon, we further now contend that in view of the particular facts in this case the Board was without power to order Jones' reinstatement to his former position, and, further, if any such power in the Board exists, it abused its discretion in ordering such reinstatement.

As shown by the evidence and the Board's findings, practically immediately after his employment was terminated Jones purchased and at all times since has been the

operator of a general merchandise store. He was also appointed United States postmaster, the office of which was in the store. His wife did most of the clerical postoffice work while he, with the assistance of his wife, conducted the business of the store. Notwithstanding these facts, the Board has not only ordered the Petitioner to offer Jones reinstatement to his former position but also to reimburse him for his earnings loss up to the time of such offer, and has even incorporated in its order (and likewise as to Moore) the clause condemned by this Court on November 12, 1940, in Case No. 14, *Republic Steel Corp. v. NLRB*, (85 L. Ed., Adv. Op., p. 1), requiring a deduction of moneys received for work performed upon relief projects and the payment of such deducted moneys to the appropriate fiscal relief agencies.

We assume that the reinstatement order of the Board is based upon Section 10 (c) of the National Labor Relations Act (herein sometimes referred to as the Act), 49 Stat. 449, which provides, in part, that the Board shall have power, where it finds an unfair labor practice, to issue an order requiring the employer "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Section 2 (3) of the Act defines an employee as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

It will be noted that under Section 10 (c) quoted above the reinstatement power of the Board is limited to "employees." It is our position that when Jones purchased and became the operator and proprietor of a general merchandise store, he necessarily thereby ceased to be an employee entitled to reinstatement within the purport of the Act; that the Act, properly construed, does not empower the Board to order reinstatement of such a former employee, and that if power in the Board exists under the language of the Act to order such reinstatement it was an abuse of discretion so to do under the circumstances existing in this case; and, lastly, if the Act shall be construed as vesting power in the Board to order Jones' reinstatement, with or without reimbursement, it is unconstitutional, in that it deprives this Petitioner of its liberty and property without due process of law and takes the private property of this Petitioner for public use without just compensation in violation of the Fifth Amendment to the Federal Constitution.

In construing the reinstatement powers of the Board contained in Section 10 (c) with the definition of an employee contained in Section 2 (3) the Circuit Courts of Appeal for the Second, Third, Fourth and Ninth Circuits have held that the Board has no power to order reinstatement unless the status of an employee exists at the time of the entry of the Board's order, and unless the employee has not, in the meantime, obtained any other regular and substantially equivalent employment.

Mooresville Cotton Mills v. NLRB (4th), 94 F. (2d) 61, 66.

Standard Lime & Stone Co. v. NLRB (4th), 97 F. (2d) 531, 535.

NLRB v. Carlisle Lumber Co. (9th), 99 F. (2d) 533, 537, 538.

NLRB v. Hearst (9th), 102 Fed. (2d) 658, 664.

NLRB v. National Motor Bearing Co. (9th), 105 F. (2d) 652, 662.

NLRB v. Botany Worsted Mills (3rd), 106 F. (2d) 263, 269.

Phelps Dodge Corp. v. NLRB (2d), 113 Fed. (2d) 202 (Adv. Op.) Pending on petition for certiorari No. 387, this Term.

Typical of the reasoning in the above cases is the following quotation from *NLRB v. Carlisle Lumber Co.* (9th), 99 Fed. (2d) 533, 537:

> "It should be noted that only 'employees' may be reinstated. Section 2 (3) of the act, 29 USCA sec. 152 (3), defines 'employee' to 'include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' Respondent makes several contentions regarding the time when the men are to be considered as employees. I think that since the act provides that the Board may 'order * * * * reinstatement of employees with or without back pay' before it could make such an order it would first have to determine whether or not the men were 'employees' at the time of its order. If the men were not 'employees' the Board would have no power to order their reinstatement. Therefore, the Board must determine when it makes its order, whether or not the men are 'employees' at such time. The Board made a like construction of the act by its finding that the men in question had not obtained substantially equivalent employment on September 26, 1936, the date of its first order, partially enforced by our former decision.
>
> "If any of the men did obtain such employment the 'employee' status, as respondent contends, could not be revived by their voluntarily or involuntarily ceasing such employment."

In the present case the Board made no finding that Jones had not obtained substantially equivalent employ-

ment, which finding, we submit, is a condition precedent to any reinstatement order. Clearly, one who becomes a proprietor of a merchandise store does not retain his status as an employee of anyone.

Again this Court has held that the power of the Board to require affirmative action is remedial and not punitive. We quote Mr. Chief Justice Hughes in the following cases:

Consolidated Edison Co. v. NLRB, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126, 143.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purpose of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices."

NLRB v. Fansteel Metal. Corp., 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 636:

"The authority to require affirmative action to 'effectuate the policies' of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in Consolidated Edison Co. v. National Labor Relations Bd. (decided December 5, 1938) 305 U. S. 197, ante, 126, 59 S. Ct. 206, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's

authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

In its recent opinion on this question, in *Republic Steel Corp. v. NLRB*, Case No. 14, this term, this Court again said:

> "This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive."

While the courts have held that an employee discharged in connection with unfair labor practice upon the part of the employee does not thereby lose his status as an employee, it has never been held to our knowledge that if the employee thereafter voluntarily ceases to be an employee of his former employer by notice to that effect given, or ceases to be an employee of anyone by embarking upon a business venture of his own under which he becomes a proprietor of a business himself and, as such, an employer, he still retains his status as an employee. A person who is not an employee of anyone because he has voluntarily put himself out of the employee class, certainly cannot on any theory still be considered an employee of the former employer. The danger of a construction of the Act which would empower the Board to order Jones' reinstatement under the facts disclosed by the record is evidenced and emphasized by the further order

of the Board that in connection with the reinstatement Jones should be reimbursed for his earnings loss up until the time offer of reinstatement is made. While it may be proper, to effectuate the purposes of the Act, to require an employer to make a discharged employee whole for any loss resulting from the wrongful discharge, it certainly cannot be proper to require an employer to subsidize a business venture and protect a former employee against the losses in the business venture in which he has voluntarily engaged. The Board's power is only to take such affirmative action as will effectuate the policies of the Act. It does include reinstatement of employees under appropriate circumstances but they must be employees of some class, and not employers or proprietors of mercantile institutions. Any reinstatement power only exists when it will effectuate the policies of the Act. If it will not effectuate the policies of the Act, the power does not exist. As held time and again by this Court, the Act is remedial and not punitive.

We submit the Act should not be construed as vesting any power in the Board to order Jones' reinstatement. To so construe it, whether or not the reinstatement be accompanied with reimbursement, will deprive this Petitioner of its liberty and property without due process and take its property for a public use without just compensation in violation of the Fifth Amendment. Finally, if, upon any theory, the Act can properly and constitutionally be considered to vest basic power in the Board to order Jones' reinstatement, we submit that the action taken by the Board is punitive and not remedial, was an abuse of discretionary power and cannot possibly effectuate the purposes of the Act. For all these reasons we submit that the judgment of the Circuit Court, in so far as it orders Jones' reinstatement, should be reversed.

Question No. 2 presented in the Petition for Writ of Certiorari and set forth above (page 6 supra) relates to Moore, and is as follows:

"Question 2

"Where an employee (F. D. Moore) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses such transfer on account of the alleged illness of his wife, and the employer, after verifying such illness, within a day or two after the transfer order offers the employee reinstatement to his old position 'for the duration of his wife's illness,' which offer the employee refuses and thereupon quits his employment from which he was receiving a wage of $112.50 per month (without room and board) and accepts and retains employment at the Wyoming State Penitentiary at a wage of $70 per month, plus room and board, and it appears that at all times up to the hearing before the Trial Examiner of the Labor Board the wife's illness continued, does the Board have the power to order such employee's reinstatement, or, if such power exists, is it an abuse of discretion to order such reinstatement?"

The facts upon which the above question is based are likewise disclosed by the record references hereinabove made.

The record is clear that Moore refused to accept the transfer to the Hobbs, New Mexico, Field, and gave his wife's illness as the reason. This claim of illness being verified, the order of transfer to the Hobbs Field was immediately revoked and Moore was ordered transferred to the Fort Collins, Colorado, Field. He likewise refused this transfer. This order was thereupon immediately withdrawn and Moore was told he could go back to work in the Big Muddy Field. This all happened in about a week after the original order of transfer and within the period covered by his retirement check payment. Moore testified that the Field Foreman stated he could go back to work in the Big Muddy Field "for the duration of my wife's illness." While the Field Foreman denied this statement, the Board resolved this conflict in favor of Moore. Moore testified that he still refused to go back to work in the Big Muddy Field for the

duration of his wife's illness and shortly thereafter secured a position as guard at the Wyoming state penitentiary, Rawlins, Wyoming, which job he still held at the time of the hearing. His wife was still ill at that time and her illness was of indefinite duration. Moore worked as a roustabout in the Big Muddy Field at $112.50 per month wage. Out of this he paid $18 per month rent for house and garage and his other living expenses. His wage at the penitentiary was $70 per month, plus his room and board. If he had accepted his transfer to the Hobbs Field, he would have worked as a tool dresser at a wage of $145.60 per month. Record references to the above facts are set forth in the "Statement of the Case" supra.

The Board found that Moore was justified in quitting and was not required to accept reinstatement of his job in the Big Muddy Field on the temporary basis of the period of his wife's illness (R. p. 48).

As we pointed out above with reference to Jones, the complaint issued by the Labor Board against the Petitioner alleged a discriminatory discharge of Moore. The evidence shows a transfer but no discharge. There is no finding of any discharge, but there is a finding of a discriminatory transfer. For the same reasons pointed out above with reference to Jones, we submit such a finding, not in conformity with any charge in the complaint, is not sufficient to justify any reinstatement relief.

Even assuming arguendo, that the findings of the Board are within the issues presented by the complaint, it clearly appears that forthwith after the transfer order was given it was revoked, and Moore was told that he could continue to work at his old job in the Big Muddy Field. This constituted reinstatement. The fact, as found by the Board, that such revocation of the transfer order and such reinstatement were coupled with a limitation of employment for the duration of the illness of Moore's wife is immaterial. That illness, as Moore testified, was of a character to indicate indefinite duration and was still continuing at the time of the hearing, some two years after the transfer. This is not a case where reinstatement is coupled with demotion or

other change in the former working conditions. Moore indicated by his testimony (R. p. 279) that what he expected was an assurance of a lifetime job. There was no duty upon his employer to give any such assurance. It is apparent that Moore voluntarily quit his employment because he was not willing, as he testified, to go back to work at his old job for the indefinite period of his wife's illness. There was no discharge. There was no transfer because the transfer order was revoked. There is nothing upon which a reinstatement order can be based. The most that can possibly be said is that there was a threat upon the part of the Petitioner, through its Field Foreman, to discharge Moore at a future date when his wife's illness should have ended. Any violation of the Act in this respect could not have occurred until the discharge should actually be made in the future. Certainly any earnings loss which Moore may have sustained is the result of his own voluntary act in quitting his employment even though his further employment was only for the duration of his wife's illness. The purpose of the law is to protect the employee from earnings loss resulting from unlawful acts of the employer and not from the voluntary acts of the employee.

Even with further employment limited to the duration of his wife's illness, such a limitation, we submit, does not constitute any unfair labor practice or any violation of the Act. It has no relation to a discriminatory discharge or a discriminatory refusal to employ or reinstate.

For these various reasons, we submit that as a matter of law under the facts disclosed by this record Moore voluntarily quit his employment and the Board committed error, affirmed by the Circuit Court, in ordering his reinstatement, either with or without reimbursement.

Finally, even assuming, arguendo, that Moore's reinstatement, coupled with a limitation that it was for the period of his wife's illness, constituted in law a discharge, this would not entitle Moore to further reinstatement now unless Moore was still an employee, within the definition of that word as used in the Act, at the time of the entry of the Board's order. The order was not entered until May 9,

1939. What his status was at that time is not disclosed by the record. At the time of the hearing before the Trial Examiner of the Labor Board in March, 1938, he was still employed at the state penitentiary.

In connection with the reinstatement order involving Jones we have, on page 17, et seq., supra, cited the uniform decisions of the courts of the various circuits holding that the status of employee must exist at the time of the entry of the Board's order. These authorities are equally applicable to Moore. Even though Moore was discharged as the result of a labor dispute or because of an unfair labor practice, he ceased to be an employee if he had obtained any other regular and substantially equivalent employment. This is within the definition of "employee" under Section 2 (3) of the Act supra. Moore was earning $112.50 per month in the Big Muddy Field. Out of this he paid $18 per month rent and his other living expenses. If he had accepted his transfer to Hobbs, New Mexico, he would have received $145.60 per month. There is evidence in the record (R. p. 299) that subsequent to the time Moore left the Big Muddy Field the roustabout wage was increased several times to a total of $135 per month at the time of the hearing.

We submit that Moore's employment at the penitentiary was regular and an employment substantially equivalent to his Big Muddy Field employment, and, being so, Moore, upon any theory, could not be considered an employee within the reinstatement provisions of the Act. As stated by the Ninth Circuit in *NLRB v. Carlisle Lumber Co.*, 99 Fed. (2d) 533, 537 (p. 18 supra):

> "If the men were not 'employees' the Board would have no power to order their reinstatement. Therefore, the Board must determine when it makes its order, whether or not the men are 'employees' at such time."

The Board made no such determination as to either Moore or Jones; in other words, there is no finding in this case that either Moore or Jones had not obtained other regular or substantially equivalent employment. Without such a finding, the Board is without power to order reinstatement

of either Moore or Jones, even assuming that other elements justifying reinstatement are present.

In conclusion, we submit, both as to Moore and Jones, that the Board was without power, under the Act, to order their reinstatement. If, however, basic power in the Board existed to order such reinstatement, it was a gross abuse of discretion to exercise that power under the facts of this case. The action of the Board in any event is punitive and not remedial, and is not in furtherance of the purposes of the Act.

As to both Jones and Moore, the judgment of the Circuit Court ordering their reinstatement should be reversed.

Respectfully submitted,

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